In the United States Court of Appeals for the Ninth Circuit

No. 18451

The Montana Power Company, petitioner

v.

Federal Power Commission, respondent

ON REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

RESPONDENT'S PETITION FOR REHEARING

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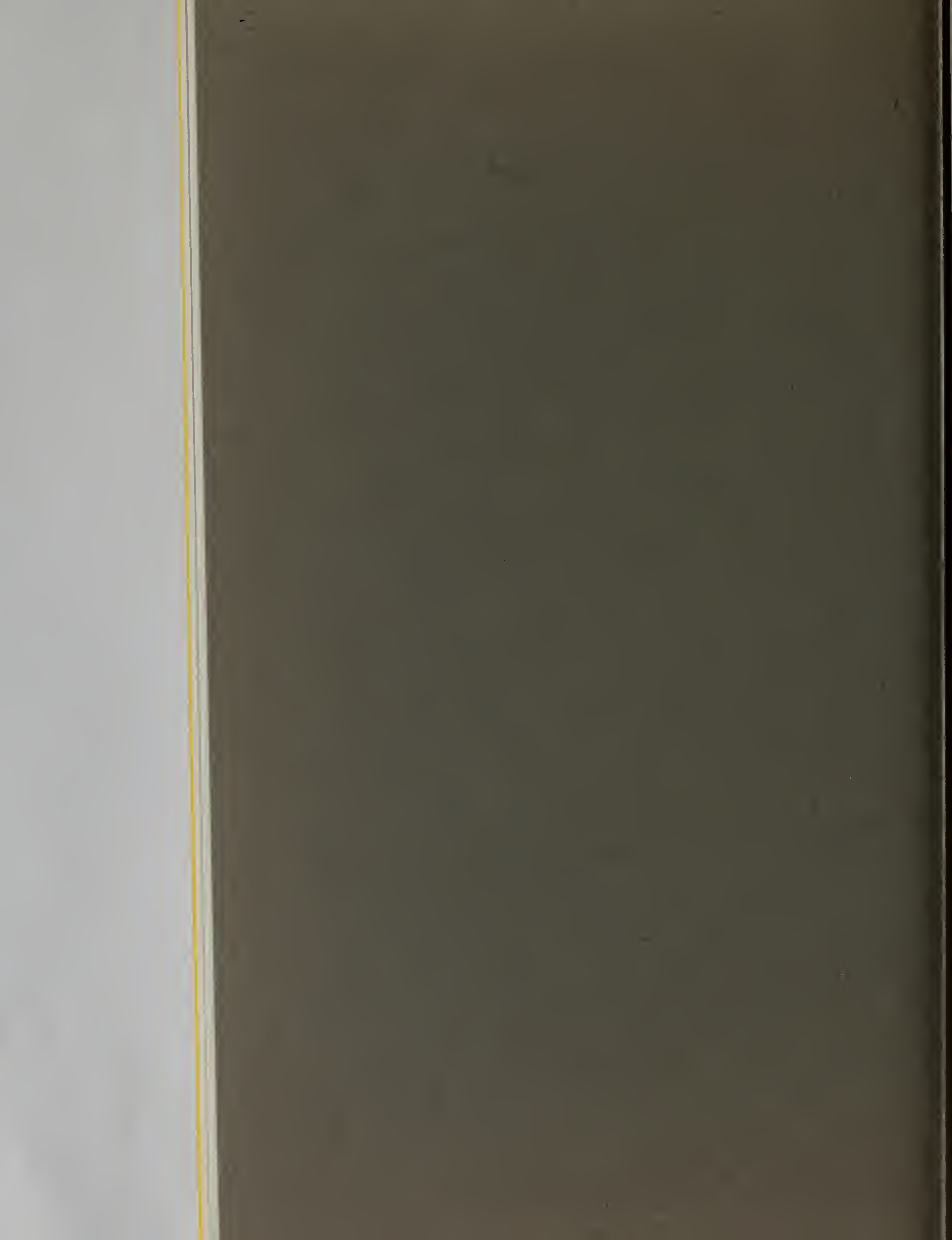

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The respondent Federal Power Commission respectfully petitions for rehearing and modification of the opinion and judgment of April 14 to avoid conflict with *F.P.C.* v. *Idaho Power Co.,* 344 U.S. 17.[1] We do not urge that where a reviewing court has laid bare an error of law which can only be corrected by one particular action the Court may not order such action, consistently with *Idaho Power.* Here the Court

[1] The Court there held (344 U.S. at p. 20): "* * * It is the Commission's judgment on which Congress has placed its reliance for control of licenses. See §§ 6, 10(a), 10(g). When the court decided that the license should issue without the conditions, it usurped an administrative function. There doubtless may be situations where the provision excised from the administrative order is separable from the remaining parts or so minor as to make remand inappropriate. But the guiding principle, violated here, is that *the function of the reviewing court ends when an error of law is laid bare.* At that point the matter once more goes to the Commission for reconsideration. * * *

"The Court, it is true, has power 'to affirm, modify, or set aside' the order of the Commission 'in whole or in part.' § 313(b). But that authority is not power to exercise an essentially administrative function. * * * [Emphasis supplied here and elsewhere in this petition unless noted.]"

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seems to have found no "error of law" in any action of the Commission—only that the result reached was "not just" to Montana-New Jersey and petitioner (slip op. pp. 10, 11). But even if it meant to conclude that a "not just" result constitutes an error of law, we believe that it overlooked an important aspect of the entirely new posture of the case which resulted from its basic holding—an aspect never briefed or argued to this Court, and one not passed on by the Commission.

As we read the Court's opinion, the central and important holding is that, in the circumstances, it was "not just" for the Commission to hold that issuance of a § 23(a) license was effectively barred at the date of its order by the fact that Montana-New Jersey's Final Power Permit had terminated by the merger and disappearance of that corporation as an operating entity. The Court viewed the consummation of the merger under § 203 authorization and licensing of the Mystic Lake project under § 4(e) (or 23(a)) as having been snarled, timewise, into a Gordian Knot that should be cut by *nunc pro tunc* action, *i.e.*, treating the licensing as though (1) a license were issued to Montana-New Jersey *as of* the eve of the merger, (2) that license were transferred to Montana-Montana *as of* the moment of the merger, and (3) those two steps were, in effect, telescoped by now issuing a license to Montana-Montana *as of* the moment of consummation of the merger.

This petition does not challenge that basic decision so understood. But the Court's adoption of that solution of the case entails a question not heretofore noticed. If the Commission was in error in denying a § 23(a) license *on the ground it did*, it does not necessarily follow that there could not be some other valid reason for denying or conditioning a § 23(a) license. The way in which we wrote our brief may have contributed to overlooking this. The opinion states (slip op. p. 8):

> The parties seem to agree that if the Commission issues a license to one who holds a valid Final Power Permit * * * Section 23(a) of that Act * * * requires that the license so issued shall be a "fair value" license * * *.

The only possible basis for that statement with respect to respondent is found on page 11 of our brief.[2] We were there discussing the option available to permittees "[a]fter [*i.e.*, upon] the enactment of the Federal Water Power Act"—when their permits generally had substantial remaining terms. What we said there must be read with our complementary statement (p. 29):

> * * * Should the holder of a permit wait until the eve of the expiration date of the permit to apply for a license, the Commission might well conclude that it would not be in the public interest to issue a license at that late date and that the permittee be permitted to continue to operate under its permit until the expiration date thereof. * * *

The opinion overlooked the complete lack of any warrant for assuming that Congress intended to give a permit holder a right to a fair value license *to succeed* an expired permit. All that Congress appears to have intended was to authorize issuance of fair value licenses *in lieu of* permits—in exchange for permits having substantial remaining terms. There was no need for the concession in other cases.[3] Where a permit is about to expire, issuance of a license to the permittee on the eve of such expiration, as contemplated in the Court's rationalization, must necessarily be regarded as being *for all practical purposes* not in lieu of a permit, but to succeed the permit. Certainly nothing in the Act or its legislative history supports the view that projects for which permits *have already expired* are entitled to fair value licenses. The court's opinion recognizes this (slip op. p. 8). The remaining question, therefore,

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[2] We there said: "After the enactment of the Federal Water Power Act, a permittee holding a valid permit had two choices. It could continue to operate under the permit until the expiration thereof without being subject to the other provisions of the Federal Water Power Act, or it could apply for a license under the Act, and, if the Commission approved the application, surrender its permit, and be issued in place thereof a license under the 1920 Act. If it followed the latter course the permittee was entitled to have its investment, at the time the license was issued, fixed at the project's fair value rather than the actual legitimate original cost thereof as provided in Section 3 (13) of the Federal Water Power Act."

[3] *Cf.* Niagara Falls Power Co. v. F.P.C., 137 F. 2d 787, 790–792 (CA 2), certiorari denied, 320 U.S. 792.

is whether the timing of the filing of this application for license presents a case which is in reality substantially different. This question, under the *Idaho Power* case, is one for "the Commission's judgment" in the first instance, upon reconsideration of this case, and beyond "the function of the reviewing court."

The fair value licenses which were issued during the first twenty years of the administration of the Act were all issued where the permits had substantial remaining terms (none less than 20 years). *Southern California Edison Company, Ltd.*, Project No. 1250, F.P.C. Annual Report, 1934, pp. 160, 224 (February 5, 1934); *San Joaquin Light and Power Corporation,* Project No. 1333, F.P.C. order of November 30, 1938 (unreported); *San Joaquin Light and Power Corporation,* Project No. 1354, F.P.C. order of December 9, 1938 (unreported). And the Commission has uniformly refused to issue fair value licenses up to four years before the expiration of the outstanding fifty-year permits. *Southern California Edison Company, Ltd.,* Project No. 1933, 5 FPC 695 (August 9, 1946); *Southern California Edison Company, Ltd.,* Project No. 1934, 5 FPC 698 (August 9, 1946); *Southern California Edison Company,* Project No. 2175, 21 FPC 419 (March 27, 1959); *Southern California Edison Company,* Project No. 2198, 21 FPC 698 (May 20, 1959).[4] Such a consistent course of administrative construction of a statute is certainly not to be ignored with impunity. *United States* v. *P.U.C.* of California, 345 U.S. 295, 314–315.[5] The force of these interpretations is strengthened by the striking absence of any appeal therefrom to the courts.

This licensing question, here first presented to any court, is one of importance far transcending that of the *sui generis* questions discussed in the opinion. It is a question which calls for the same full, careful, and objective consideration and discussion the Court has given the less important questions. Its early authoritative resolution will be of invaluable assistance in the avoidance of administrative snarls in other cases, at least one of which will soon come before the Commission for decision.

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[4] The license application for Project No. 2198 was filed over 7½ years before the permit expiration date.

[5] See also *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294; *United States* v. *American Truckin Assn's.,* 310 U.S. 534, 549.

These are unusual circumstances which, objectively considered, call for modification of the opinion and judgment.

Respectfully submitted,

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Certificate

I hereby certify that that foregoing petition for rehearing is in my judgment unusually well founded and is certainly not interposed for delay.

Howard E. Wahrenbrock.

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